

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Augusta Division

IN RE:	)	Chapter 7 Case
	)	Number <u>88-11124</u>
BOSWELL ELECTRICAL	)	
CONTRACTORS, INC.	)	
	)	
Debtor	)	
_____)	)	
	)	
ACE ELECTRIC SUPPLY COMPANY,	)	Filed
INC.	)	at 5 O'clock & 30 min. PM
	)	Date: 6-27-90
Plaintiff	)	
	)	
vs.	)	Adversary Proceeding
	)	Number <u>89-1056</u>
JAMES D. WALKER, JR.	)	
as Chapter 7 Trustee and	)	
BOSWELL ELECTRICAL CONTRACTORS,	)	
INC.	)	
	)	
Defendant	)	

**ORDER**

Plaintiff, Ace Electric Supply Company, Inc. (hereinafter referred to as "Ace Electric"), filed this complaint seeking turnover of property held by James D. Walker, Jr., the Chapter 7 trustee for debtor, Boswell Electrical Contractors, Inc. (hereinafter referred to as "Boswell"). Based upon the pleadings, evidence presented at trial, and the arguments of counsel, the court makes the following findings of fact and conclusions of law.

**FINDINGS OF FACT**

1. The facts of this case are not in dispute. On or about December 2, 1987, Boswell submitted a bid to the City of Augusta, Georgia for the "Public Facilities and Improvements Program - Street Lighting Improvement Program: Sixth Street from Reynolds to Telfair Streets." The bid was for Ninety Thousand and

No/100 (\$90,000.00) Dollars and was accepted by the City Council of Augusta. A written contract dated May 3, 1988 was entered into by Boswell and the City of Augusta.

2. A second contract in the sum of Nine Thousand Nine Hundred Seventy-Two and No/100 (\$9,972.00) Dollars was entered into between the City of Augusta and Boswell providing for additional lighting to be installed in another but contiguous area.

3. To fulfill the requirements of both contracts, Boswell purchased on an open account certain materials and supplies from Ace Electric. Ace Electric was the sole supplier of materials used on the street lighting projects. The following is a list of unpaid invoices sent to Boswell by Ace Electric for materials purchased by Boswell for use on the two street lighting projects:

<u>INVOICE NO.</u>	<u>INVOICE DATE</u>	<u>INVOICE AMOUNT</u>	<u>OUTSTANDING AMOUNT</u>
213282	05/24/88	\$13,873.86	\$ 3,113.94
213369	05/24/88	\$18,098.50	\$18,098.50
217702	06/03/88	\$ 106.39	\$ 106.39
217760	06/03/88	\$ 115.04	\$ 115.04
228941	06/27/88	\$ 15.55	\$ 15.55
241984	07/27/88	\$ 5,316.95	\$5,316.95
TOTAL		\$37,526.29	\$26,766.37

4. Boswell incorporated the materials furnished by Ace Electric into the street lighting projects and substantially completed the street lighting projects prior to filing for protection from its creditors under Chapter 7 of the Bankruptcy Code on September 9, 1988. On the date of filing the petition, Boswell needed to complete only Two Hundred Eighty-Five and No/100 (\$285.00) Dollars worth of work to complete the contract requirements.

5. Although the contracts with the City of Augusta provided for payments only after the contracts were completed, Boswell received certain progress payments over the period of time that the work was performed because of delays in

completing the contracts caused by the City of Augusta. As of the date of filing the petition in bankruptcy, the City of Augusta owed Boswell the sum of Sixteen Thousand One Hundred Forty-Seven and 86/100 (\$16,147.86) Dollars for work completed on the first contract and Five Thousand Nine Hundred Sixty and No/100 (\$5,960.00) Dollars for work completed on the second contract. Payment requests were made by Boswell as

follows:

<u>PAYMENT REQUESTS</u>	<u>REQUEST DATE</u>	<u>REQUESTED PAYMENT AMOUNT</u>
1	04/22/88	\$10,000.00
2	06/23/88	\$40,000.00
3	07/25/88	\$ 3,972.00
4	08/02/88	\$24,000.00
5	08/25/88	\$ 5,960.00
6	08/25/88	\$16,147.86

6. All requests for payment by Boswell were paid prepetition, except requests numbers five (5) and six (6). The City of Augusta refused to pay these requests to Boswell because of the bankruptcy filing. On June 6, 1989, the City of Augusta paid to the Chapter 7 trustee, the sum of Twenty-Two Thousand One Hundred Seven and 86/100 (\$22,107.86) Dollars which represented all monies due to Boswell under the two contracts.

#### CONCLUSIONS OF LAW

Ace Electric contends that it is entitled to the contract proceeds held by the trustee because such proceeds are held in a constructive trust for the benefit of subcontractors and suppliers on the contract and, therefore are not property of the estate. The Georgia Court of Appeals has determined that "[i]f (a contractor) received the full contract price for the job he became a trustee of the funds for the purpose of disbursing them properly to those who held valid claims for labor and material . . . ." Short & Paulk Supply Co. v. Dykes, 120 Ga. App. 639, \_\_\_, 171 S.E.2d 782, 788 (1969). The Eleventh Circuit Court of Appeals, relying on an

earlier Fifth Circuit case, Cutler-Hammer, Inc. v. Wayne, 101 F.2d 823 (5th Cir. 1939), cert. denied, 307 U.S. 635, 59 S.Ct. 1031, 83 L.Ed. 1517 (1939), determined that under the current laws of the State of Georgia, proceeds paid into the court by a property owner or governmental unit as a result of a general contractor filing for relief under the Bankruptcy Code are impressed with a constructive trust in favor of any subcontractors and suppliers. First Bulloch Bank & Trust Co. v. Inca Materials (In re: Inca Materials), 880 F.2d 1307 (11th Cir. 1989). The Eleventh Circuit found that the critical issue resolved by Cutler-Hammer was that money paid into the court by an owner of property after a general contractor files for protection under the Bankruptcy Code does not become property of the debtor general contractor's estate. *Id.* at 1311. See also United Parcel Service v. Weben Industries, 794 F.2d 1005 (5th Cir. 1986).

The debtor's bankruptcy estate does not include "property which ostensibly belongs to the debtor, [but] is, in reality held by the debtor in trust for another." 4 Collier on Bankruptcy ¶541.01 (L. King 15th ed. 1989). "For example, if the debtor has incurred medical bills that were covered by insurance and the insurance company had sent payments of the bills to the debtor before the debtor had paid the bill for which the payment was reimbursement, the payment would actually be held in constructive trust for the person to whom the bill was owed. The payment would

not, therefore, become property of the estate pursuant to section 541. *Id.* See also H.R. Rep. No. 595, 95th Cong., 1st Sess. 367-68 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 82-83 (1978). Therefore, in accordance with the binding authority of the Eleventh Circuit decision that payments by a property owner to a general contractor are held in trust by the general contractor for the benefit of the subcontractors and suppliers, the money paid to the trustee by the City of Augusta for debtor Boswell is not property of the debtor's estate, but is held in trust for the only supplier or subcontractor on the project, Ace Electric.

Accordingly, it is ORDERED that the trustee immediately turnover to Ace Electric all proceeds paid to him by the City of Augusta on behalf of debtor Boswell for the work Boswell performed on the two street lighting contracts. Judgment is entered for the plaintiff, Ace Electric Supply Company, Inc., against James D. Walker, Jr. in his capacity as trustee of the estate of Boswell Electrical Contractors, Inc. in the amount of Twenty-Two Thousand One Hundred Seven and 86/100 (\$22,107.86) Dollars plus all interest accrued on such funds while in the possession of the trustee, together with future interest at such rate as provided by law.

JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 27th day of June, 1990.